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Supreme Court, U.S.
FILED

No. ~~02~~ 119

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In The

Supreme Court of the United States

EWAN BRYCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Facsimile: (203) 776-9494
E-Mail: jrw@johnrwilliams.com
Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

DO THE FIFTH AMENDMENT'S PROTECTION AGAINST DOUBLE JEOPARDY AND ITS GUARANTEE OF DUE PROCESS OF LAW, IN CONJUNCTION WITH THE SIXTH AMENDMENT'S GUARANTEE OF TRIAL BY JURY, PRECLUDE A DISTRICT JUDGE FROM INCREASING A DEFENDANT'S SENTENCE UPON REMAND FOLLOWING AFFIRMANCE OF THE CONVICTION ON APPEAL, UPON THE BASIS OF CONDUCT OF WHICH THE JUDGE AND THE GOVERNMENT WERE AWARE PRIOR TO THE DEFENDANT'S INITIAL SENTENCING AND OF WHICH THE DEFENDANT WAS ACQUITTED AT A JURY TRIAL WHICH TOOK PLACE BETWEEN THE DATE OF THE REMAND FROM THE COURT OF APPEALS AND THE DATE OF THE SECOND SENTENCING?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	13

TABLE OF AUTHORITIES

Page

CASES

McClain v. United States, 676 F.2d 915 (2d Cir. 1982) 7

North Carolina v. Pearce, 395 U.S. 711 (1969) 8, 9

Ring v. Arizona, ___ U.S. ___, 70 U.S.L.W. 4666 (2002) 11, 12

Santiago v. United States, 954 F. Supp. 1201 (N.D. Ohio 1996) 7

United States v. Benbrook, 119 F.3d 338 (5th Cir. 1997) 7

United States v. Bryce, 208 F.3d 346 (2d Cir. 2000) 4

United States v. Campbell, 106 F.3d 64 (5th Cir. 1997) 9

United States v. Coke, 404 F.2d 836 (2d Cir. 1968) (en banc) 10

United States v. DiFrancesco, 449 U.S. 117 (1980) 6

United States v. Fogel, 829 F.2d 77, 264 U.S. App. D.C. 292 (1987) 7

United States v. Gelb, 944 F.2d 52 (2d Cir. 1991) 7

United States v. Gevaras, 961 F. Supp. 192 (N.D. Ohio 1996) 7

United States v. Goodwin, 457 U.S. 368 (1982) 9

United States v. Murray, 144 F.3d 270 (3d Cir. 1998) 7

United States v. Oliver, 941 F. Supp. 1109 (M.D. Ala. 1996) 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Pisani, 787 F.2d 71 (2d Cir. 1986) 5

United States v. Resendez-Mendez, 251 F.3d 514 (5th Cir. 2001) 9

United States v. Smith, 115 F.3d 241 (4th Cir. 1997) 7

United States v. Watts, 519 U.S. 148 (1997) 11

United States v. Williams, 651 F.2d 644 (9th Cir. 1981) 10

Wassman v. United States, 468 U.S. 559 (1984) 9

CONSTITUTIONS

U.S. Const. amend. V 1, 5, 6, 11

U.S. Const. amend. VI 2, 6, 12

STATUTES

21 U.S.C. §841(a)(1) 2

21 U.S.C. §846 2

28 U.S.C. §1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ewan Bryce, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on April 22, 2002, and was published at 287 F.3d 249. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on April 6, 2001. It was published at 141 F. Supp. 2d 269. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . "

STATEMENT OF THE CASE

In an indictment handed down in December of 1997, the petitioner Ewan Bryce was charged with conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1) and 846. In a second count of the same indictment, he was charged with possessing with intent to distribute, and with distributing, the same quantity of the same substance, in violation of 21 U.S.C. §841(a)(1). He was convicted of both counts at a jury trial in April of 1998.

Prior to that trial, a government informer named Jermaine Fitzpatrick, who was an acquaintance of Mr. Bryce's and had been supplying the government with information concerning him, was murdered in Mr. Bryce's presence. From the moment of the murder, the government believed Mr. Bryce was the killer; he was taken into police custody at the scene and interrogated at length, but released for lack of sufficient evidence.

These facts were brought to the attention of the trial judge during Mr. Bryce's trial in April of 1998. On the first day of that trial, the government sought to have Detective

Dennis Sikoski of the Hartford Police Department identify Mr. Bryce's voice on a tape recording of a wiretapped conversation. The government based that attempted voice identification upon Detective Sikoski's three-hour interrogation of Mr. Bryce in connection with the murder. At a side-bar proffer, the Assistant United States Attorney advised the court: "Your Honor, the defendant was interviewed in connection with a homicide at which he was present, and this happened after he was indicted. . . . I've informed [defense counsel] previously that I intended to elicit this information at trial. However, not to bring forward the fact that it was in the context of a murder investigation which may involve Mr. Bryce, himself. . . . " Later, the prosecutor elaborated: "Mr. Bryce was personally present when a person alleged to be a federal cooperating witness was murdered by being shot in the chest and the face in excess of ten times. He was one of the two people who was present there, and he was interviewed almost immediately after the murder in regard to his knowledge of the murder and his involvement in the murder. He was interviewed by Hartford police officers and FBI agents who were accompanying Hartford police officers. It is my understanding that the interview was limited to homicide investigation."

Based in part on the testimony of Detective Sikoski, Mr. Bryce was convicted on both counts of the indictment. He was sentenced on August 17, 1998, to identical concurrent sentences of 124 months on each of the two counts. On appeal, the Second Circuit held that there was insufficient evidence to support Mr. Bryce's conviction on the second count. Accordingly, in its published opinion, the court reversed his conviction on Count Two, affirmed his conviction on Count One, and remanded "for resentencing."

United States v. Bryce, 208 F.3d 346, 356 (2d Cir. 2000). The final version of that decision was handed down on March 7, 2000. However, that portion affirming Mr. Bryce's conviction on Count One was issued originally on August 24, 1999, and never challenged by either party. The government, however, sought and obtained reconsideration of the court's ruling on Count Two, resulting in the additional delay in issuance of the last of several mandates in the case. The mandate, when it was issued, said nothing about resentencing. The mandate stated that "it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district be and it hereby is affirmed in part, reversed in part, and the case is remanded to the district court for further proceedings in accordance with the opinion of this court."

Meanwhile, Mr. Bryce had been indicted for the murder the government had disclosed to the district judge on the record in April of 1998. That indictment, handed down in 1999, charged Mr. Bryce in two counts with the single murder of the government informer. The case was assigned to the same district judge and went to trial in September of 2000. Mr. Bryce was acquitted.

Only then, months after remand, did the district court schedule the resentencing which had been ordered by the Court of Appeals in its opinion of March 7, 2000. A hearing was conducted on February 23, 2001. The court there held that it had power to resentence Mr. Bryce on Count One of the indictment and that in doing so it could consider whether he had committed the murder of which he had been acquitted. The court, rejecting the jury's implicit finding that the government's jailhouse witnesses were liars, held that in its opinion Mr. Bryce had committed the murder prior to his original trial in the drug case and

increased his sentence to the maximum permitted by the statute, which was essentially twice that which originally had been imposed.

After the petitioner filed his appeal, the district judge issued a "Memorandum Opinion" stating his reasons. Among other things, the court said it had sentenced Mr. Bryce to twice his original sentence because that was the statutory maximum for the offense of conviction; it would have sentenced him to life had the statute permitted it. The eyewitness, whose testimony exonerated Mr. Bryce, was found not credible by the court because of her "demeanor". The court held that the evidence concerning the murder was "new" and permitted its action despite the defendant's contentions that resentencing was barred by the due process presumption of vindictiveness under circumstances like these, and prohibited by the double jeopardy clause of the Fifth Amendment. Distinguishing *United States v. Pisani*, 787 F.2d 71, 75-76 (2d Cir. 1986).

The Second Circuit affirmed, holding in a ruling which is without precedent, that in a case where identical sentences were imposed on each of two counts, so that there was no "package" sentence imposed, and on appeal only one of those two convictions is reversed, the trial court nevertheless is free to resentence on the affirmed count. The Court of Appeals further held that, although the government had alerted the district judge before the original sentencing to its suspicions that the petitioner had murdered its witness, the government lacked until sometime after the original sentencing but before the petitioner's murder trial the testimony of a jailhouse witness, whose testimony was rejected by the petitioner's jury but accepted by the district judge and allegedly was a "key witness. . . . " 287 F.3d at 254. Holding, therefore,

that resentencing is permitted even when a conviction has been affirmed on appeal and that the district court had new evidence before it when resentencing took place, and taking it for granted that the district court was not bound by the jury's acquittal of the petitioner, the Second Circuit held that the doubling of petitioner's sentence violated neither the Fifth nor the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

I PETITIONER'S FIFTH AMENDMENT RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED WHEN THE DISTRICT COURT, AFTER APPEAL, RESENTENCED HIM TO AN INCREASED SENTENCE ON A COUNT WHICH HAD BEEN AFFIRMED, AND AS TO WHICH HIS SENTENCE HAD NOT BEEN VACATED, WHEN THE ORIGINAL SENTENCE WAS NOT PART OF A "PACKAGE SENTENCE"

When a defendant appeals from the judgment in a criminal case, the sentence is not considered final for purposes of the Fifth Amendment's protection against double jeopardy, until the judgment has been affirmed. *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

The defendant in this case did appeal his conviction on the First Count of the indictment as well as his conviction on the Second Count. The court, however, affirmed his conviction on the First Count. Indeed, it did so as early as August, 1999. While the government challenged, by motion for reargument, the court's holding overturning the conviction on Count Two, no such challenge was filed by either

party to the order affirming the conviction, and sentence, on Count One.

There arises, therefore, from that very fact a presumption that the sentence imposed on Count One could not be tampered with on remand. See generally, *e.g.*, *United States v. Fogel*, 829 F.2d 77, 264 U.S. App. D.C. 292 (1987); *United States v. Gevaras*, 961 F. Supp. 192 (N.D. Ohio 1996).

A number of cases, however, primarily in the pre-Guidelines era, carved out an exception to this general rule. That exception applies to so-called "package sentences" where a court intends a specific net sentence and achieves that result by imposing consecutive sentences, below the statutory maximum, on various counts. When the conviction on some of those counts is reversed, it has been held that resentencing is permissible on the affirmed counts so as not to defeat the original intention of the sentencing judge. *E.g.*, *United States v. Gelb*, 944 F.2d 52 (2d Cir. 1991); *United States v. Murray*, 144 F.3d 270 (3d Cir. 1998); *United States v. Smith*, 115 F.3d 241 (4th Cir. 1997); *United States v. Benbrook*, 119 F.3d 338 (5th Cir. 1997); *United States v. Oliver*, 941 F. Supp. 1109 (M.D. Ala. 1996); *Santiago v. United States*, 954 F. Supp. 1201 (N.D. Ohio 1996).

The "package sentence" exception, however, does not apply to "non-interlocking" sentences. *McClain v. United States*, 676 F.2d 915, 918 (2d Cir. 1982). See also *United States v. Gelb*, *supra*, 944 F.2d at 58-60; *United States v. Pisani*, 787 F.2d 71, 74-76 (2d Cir. 1986). The goals of the "package sentence" exception are inapplicable to this case because (a) the sentences did not interlock and (b) the sentence imposed on Count One was, except for the $100

special assessment imposed on Count Two, the entire, total, full sentence that had been imposed in the case.

Moreover, the sentence on Count One became final, when affirmed in a decision which – as to that aspect – was never challenged thereafter, in August of 1999 – well over a year before the district court chose to resentence Mr. Bryce over his objection and to double his sentence.

II THE DISTRICT COURT FAILED TO OVERCOME THE PRESUMPTION OF VINDICTIVENESS, AND THUS DENIED THE DEFENDANT DUE PROCESS OF LAW, WHEN IT DOUBLED HIS SENTENCE FOLLOWING HIS UNSUCCESSFUL APPEAL ON THE BASIS OF ALLEGED MISCONDUCT PRIOR TO THE FIRST SENTENCE OF WHICH THE DISTRICT COURT WAS, OR SHOULD HAVE BEEN, AWARE AT THE TIME OF THE ORIGINAL SENTENCING

Due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). While concern that the individual defendant not suffer retribution for a successful appeal plays a part in the prohibition upon such sentence increases, the greater concern is to avoid the chilling effect such increased sentences upon remand will inevitably have upon future defendants' exercise of their appellate rights. Thus, the rule is "a prophylactic one, addressed more to protect future litigants who appeal than to the injustice done in the actual case. Tolerance of a court's vindictiveness might 'chill' a defendant's right to seek an

appeal of her sentence." *United States v. Campbell*, 106 F.3d 64, 67 (5th Cir. 1997).

Due process, accordingly, establishes an objective "presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374 (1982). The presumption is an objective one, which because it is objective implies no disrespect to the sentencing judge. And it can be overcome only by objective evidence in the record, and not by the judge's protestations of his nonvindictive motivation. "The great deference we owe to district courts' sentencing is erased by the *Pearce* presumption when a harsher sentence is imposed on resentencing, and the sentencing court must rebut the presumption of vindictiveness with some objective reason for its reassessment." *United States v. Resendez-Mendez*, 251 F.3d 514, 517 (5th Cir. 2001).

The *Pearce* rule emphatically prohibits courts at resentencing from increasing the defendant's sentence on the basis of facts which were, or could have been, known to the court at the time of the original sentencing. The type of objective evidence which can overcome the presumption of vindictiveness is "relevant conduct or events that occurred *subsequent* to the original sentencing proceedings." *Wassman v. United States*, 468 U.S. 559, 572 (1984). (Emphasis supplied.) *Pearce* itself expressly held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding*." 395 U.S. at 726. (Emphasis supplied.)

Accordingly, it has been held that a defendant's indictment and conviction in state court for murder following the imposition of the first sentence in federal court could not overcome the objective presumption of vindictiveness for an increased sentence after a successful appeal when the murder underlying the state court conviction had occurred before the original federal sentence was imposed. *United States v. Williams*, 651 F.2d 644 (9th Cir. 1981).

If it ever is permissible to increase a sentence on the basis of asserted facts that existed prior to the first sentence, a dubious proposition, it is not permissible to do so just because the government did not seek a delay of the first sentencing to enable it to present the enhancing facts or the sentencing judge was insufficiently thorough the first time around. "We regard it as much more doubtful whether a heavier sentence is justified simply because, as here, the second judge went to more pains in investigating defendant's general behavior prior to the initial sentence than did the first. The Government could have asked Judge Dawson to defer Coke's sentence after the first conviction . . . and this could have developed the additional facts . . . that led Judge Cooper to increase the sentence. In these situations the important interest that appeals not be deterred outweighs the Government's rather slight interest in an increased sentence because of facts that were or could have been brought before the first judge." *United States v. Coke*, 404 F.2d 836, 846 (2d Cir. 1968) (*en banc*) (Friendly, J.).

In this case, the objective fact is that the murder, and the fact that the petitioner was suspected of committing it, were actually brought to the attention of the sentencing

judge four months before the first sentencing. The fact that the government then elected not to develop the matter, or to seek a sentence increase because of it, and the fact that the judge elected not to pursue the matter, either, before imposing sentence, cannot constitute objective evidence of new facts warranting an increased sentence after remand.

III. THIS COURT'S RECENT RULING IN *RING V. ARIZONA* CASTS DOUBT UPON THE CONTINUED VIABILITY OF *UNITED STATES V. WATTS* AND SUGGESTS THAT THE DISTRICT COURT MAY NOT INCREASE A DEFENDANT'S SENTENCE ON THE BASIS OF ALLEGATIONS OF WHICH A JURY HAS ACQUITTED THE DEFENDANT

In *United States v. Watts*, 519 U.S. 148, 154-57 (1997), this court held that a sentencing judge may impose sentence upon the basis of factors of which a jury has acquitted the defendant. That doctrine found its most extreme application ever in the present case, in which the petitioner was acquitted of a murder but, on resentencing, the district court doubled his previous sentence solely on the basis of a finding that, contrary to the opinion of the jury, the court believed the petitioner had committed that crime. Both lower courts in this case assumed that *Watts* permitted the court to act as it did in this case, assuming that the Fifth Amendment factors previously discussed were not a bar.

Since the Second Circuit handed down its ruling, however, this court has decided *Ring v. Arizona*, ___ U.S. ___, 70 U.S.L.W. 4666 (2002). While *Ring* involved the difference between a life sentence and a death sentence, on

the basis of factors found by the trial judge, there is in truth nothing beyond the "death is different" argument to distinguish it from the case here at bar. In this case, the petitioner already had been sentenced. The court later doubled that sentence solely on the basis of its disagreement with the jury's verdict in a case against the petitioner which was tried after the Court of Appeals had returned the matter to the district court but before that court had got around to the resentencing.

The concurring opinion of Justices Scalia and Thomas in *Ring* makes the essential point in respect to the present question: "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." 70 USLW at 4674. In *Ring*, this court took a significant step in the direction of recognizing that principle. It now should consider, in the extraordinary circumstances of the present case, whether the Sixth Amendment permits a district court, in effect, to set aside a jury acquittal with which it disagrees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Facsimile: (203) 776-9494
E-Mail: jrw@johnrwilliams.com

Counsel for Ewan Bryce, Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 722 August Term, 2001

(Argued February 28, 2002 Filed Apr. 22 2002)

Docket No. 01-1142

UNITED STATES OF AMERICA,

Appellee,

v.

EWAN BRYCE,

Defendant-Appellant,

DARREN JOHNSON,

Defendant.

Before: KEARSE, JACOBS and KEITH,* *Circuit Judges*.

Appeal from district court's imposition of increased sentence following defendant's appeal of initial conviction on two counts of narcotics trafficking and successful appeal of one of the courts.

We **AFFIRM** the new sentence imposed by the United States District Court for the District of Connecticut, (Robert N. Chatigny, U.S.D.J.).

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

DAVID A. RING, Assistant United States Attorney, Hartford, Connecticut (John A. Danaher III, United States Attorney for the District of Connecticut, New Haven Connecticut, on the brief), *for Appellee*.

JOHN R. WILLIAMS, New Haven, Connecticut, *for Defendant-Appellant*.

DAMON J. KEITH, *Circuit Judge*:

Ewan Bryce, the defendant-appellant, appeals the district court's resentencing following his initial conviction on two narcotics trafficking charges and successful appeal of one of these charges. On the defendant's first appeal, this Court vacated one of the two charges for which defendant was convicted and remanded to the district court with general instructions that the defendant be resentenced. For the reasons set forth below, we **AFFIRM** the new sentence imposed by the district court.

I. BACKGROUND

In December 1997, a federal grand jury in Connecticut returned a two-count indictment charging the defendant with (i) conspiracy to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846 ("Count 1"), and (ii) possession with intent to distribute and distribution of more than five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) ("Count 2").

The defendant was released on bond and trial was scheduled to commence in mid-April, 1998. On March 15, 1998, a confidential informant, Jermaine Fitzpatrick ("Fitzpatrick"), who had assisted in the investigation of the case was murdered. The defendant's drug trial went

forward as scheduled and resulted in his conviction on both counts. In August 1998, the district court sentenced the defendant on each count to 124 months in prison followed by supervised release for five years, the sentences to run concurrently. The district court also ordered the defendant to pay a special assessment of $100 on each count.

The defendant appealed both counts of his conviction. In an opinion issued in August 1999, this Court affirmed the judgment on the conspiracy count, Count 1, reversed for insufficient evidence the judgment on the substantive count, Count 2, and remanded the case for resentencing. *See United States v. Bryce,* 208 F.3d 346 (2d Cir. 1999). The written opinion stated that the case was remanded for "resentencing." *Id.* at 356. In the separate mandate from this Court issued the same day as the opinion, we ordered the district court to conduct "further proceedings in accordance with the opinion of this court."

While defendant's appeal of his two-count conviction was pending, he was indicted for murdering Fitzpatrick with intent to (i) prevent him from testifying at the drug trial, 18 U.S.C. § 1512(a)(1)(A), and (ii) retaliate against him for providing information to law enforcement officers, 18 U.S.C. § 1513(a)(1)(A). The murder case went to trial, with the defendant taking the stand during his trial. On the stand, Bryce admitted his involvement in cocaine trafficking (which he had denied during the drug case trial), but denied killing Fitzpatrick. The jury acquitted Bryce on the murder charge. Subsequently, pursuant to this Court's August 24, 1999 decision, the defendant appeared before the district court judge for resentencing on the conviction stemming from the drug case trial.

Before resentencing, both sides submitted papers seeking a new sentence on the surviving count of conviction, Count 1. The government asked for a substantial increase in the sentence, arguing that the defendant killed Fitzpatrick to prevent him from testifying in the drug case brought by the government against the defendant. The defendant, on the other hand, sought a sentence reduction on the grounds that his testimony in the murder case entitled him to credit for acceptance of responsibility under the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G."), and that he had suffered extraordinary emotional distress as a result of being charged with a capital offense he did not commit.

Neither side's papers specifically addressed whether the new sentence on Count 1 could be altered if the sentences previously imposed on the two counts were not interrelated. Accordingly, a hearing was scheduled pending briefing on the issue. After the hearing, the district court sentenced the defendant *de novo,* and increased the offense level due to the district court judge's finding that the defendant had murdered Fitzpatrick to thwart prosecution of his drug case. Upon resentencing, the district court judge imposed the statutorily authorized maximum sentence of twenty years.

II. DISCUSSION

a. The Appellate Court's Mandate

We review the district court's decision *de novo, Irby v. New York City Transit Authority,* 262 F.3d 412 (2d Cir. 2001), because the defendant's appeal challenges the district court's rulings of law. On appeal, the defendant argues that this Court's mandate after his initial appeal

from the drug convictions precluded the district court's *de novo* resentencing on the surviving conspiracy count. We disagree.

We find the defendant's interpretation of this Court's mandate, although plausible, to be unpersuasive. The mandate rule "compels compliance on remand with the dictates of the superior court and foreclose relitigation of issues expressly or *impliedly* decided by the appellate court." *United States v. Zvi,* 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Bell,* 5 F.3d 64, 66 (4th Cir. 1993)). "Likewise, where an issue [is] ripe for review at the time of the initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Id.* "To determine whether an issue remains open for reconsideration on remand, the trial court should look to both the specifics of the dictates of the remand order as well as the broader 'spirit of the mandate.'" *Id.* (quoting *United States v. Kikumura,* 947 F.2d 72, 76 (3d Cir. 1991)). In this circuit, we have adopted a mandate rule that permits, if it does not require, *de novo* sentencing unless the mandate specifically limits the scope of the resentencing. *See United States v. Atehortva,* 69 F.3d 679, 685 (2d Cir. 1995).

Our mandate was open. The defendant argues nevertheless that we were obliged to limit the scope of our mandate as to Count I because that count was untouched by the appellate court and because the two sentences were not interrelated. In support of this proposition, the defendant cites *United States v. Pisani,* 787 F.2d 71 (2d Cir. 1986), a pre-Guidelines case.

In *Pisani*, this Court refused to remand the case for resentencing because the vacated counts of conviction were unrelated to the count that survived. *Id.* at 75-76. We have acknowledged that *Pisani* remains good law under the Guidelines. *See, e.g., United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996). However, its application to Guidelines cases is qualified by the Guidelines principle that "[e]ven where the appellate court remands a case with specific limiting instructions, such a mandate does not 'preclude' a departure based on intervening circumstances." *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (*per curiam*) ("[A] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing."); *see also Werber v. United States*, 149 F.3d 172, 178 (2d Cir. 1998) (requiring the court "to resentence in light of circumstances as they [stand] at the time of his resentencing").

The principle that a defendant is sentenced as he stands before the court derives partly from the Guidelines requirement that relevant conduct *must* be taken into account in setting a defendant's Guidelines range. *See* U.S.S.S.G. [sic] § 1B1.3(a).[1] Because intervening

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[1] Section 1B1.3 of the Guidelines defines "relevant conduct" to include:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant; and

(B) in the case of jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. U.S.S.G § 1B1.3(a).

Any conduct that is "relevant" to the instant offense under § 1B1.3 must be "taken into account in the determination of the offense level for the instant offense." Section 1B1.3 uses mandatory language: The

(Continued on following page)

circumstances that qualify as relevant conduct are not considered by the appellate court, it is the role of the sentencing court to weigh them on remand. Thus, in Guidelines cases the district court may enhance even interrelated sentences if the departure from the prior sentence is predicated on relevant conduct.

Here, the record is replete with facts that demonstrate that the district court assessed new evidence upon which it rested its decision to resentence the defendant *de novo.* At the time of the initial sentencing, the government had intimated without alleging that Bryce had killed a government witness, Jermaine Fitzpatrick ("Fitzpatrick"), in an attempt to prevent him from testifying. However, the government did not have the means of proving that the defendant had killed Fitzpatrick for that purpose, because the key witness to the murder did not come forward until after the first sentence. As a result of this development, the government was able to elicit new information concerning the defendant's relevant conduct that supported a sentence increase under the Guidelines. *See United States v. Watts,* 519 U.S. 148, 154-157 (holding that a court may consider conduct underlying the acquitted charge as long as the conduct was proved by a preponderance of the evidence); *see also United States v. SKW Metals & Alloys, Inc.,* 195 F.3d 83, 92 (2d Cir. 2000).

The defendant argues that because the facts regarding Fitzpartick's murder existed before the first sentencing

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instant offense's base offense level, specific offense characteristic, and adjustments all "*shall* be determined on the basis of" the conduct § 1B1.3 defines as relevant. U.S.S.G. § 1B1.3(a) (emphasis added).

hearing, the district court should either have used this information during the first sentencing hearing or not at all. However, new evidence that clearly implicates a defendant in a crime can also be considered as the intervening circumstances that a judge must consider during resentencing, notwithstanding that the suspicion existed earlier. In this case, further investigation and court proceedings provided new facts regarding the defendant's conduct which the district court properly determined to be relevant in accounting for defendant's increased sentence. Because the district court was presented with new evidence that it was obliged to consider, we find that the present case falls outside the ambit of *Pisani*.

The defendant in *Pisani* also presented a double jeopardy argument, which we were not required to reach, because we invalidated the enhanced remand sentence on other grounds. *Pisani*, 787 F.2d at 76 n.8 ("Since we conclude that consideration of an increased sentence is not warranted, we do not reach Pisani's contention that an *increased sentence would violate the Double Jeopardy Clause.*") (emphasis added). Because we find that consideration of an increased sentence *is* warranted for Bryce, we must reach the constitutional question.

"The Double Jeopardy Clause generally prohibits courts from enhancing a defendant's sentence once the defendant had developed a legitimate 'expectation of finality in the original sentence.'" *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980)). Because "a sentence does not have the qualities of constitutional finality that attend an acquittal" a district court is sometimes permitted to increase a sentence even after appeal.

DiFrancesco, 449 U.S. at 134, 137; *see also North Carolina v. Pearce,* 395 U.S. 711, 723 (1969).

It cannot be said that the resentencing in this case upset any expectation of finality to which Bryce was entitled. On the original appeal, Bryce sought reversal or vacatur of both offenses of conviction, arguing that (i) the convictions relied on insufficient evidence, (ii) the district court made erroneous evidentiary rulings, and (iii) the government improperly excluded a juror for racially-motivated reasons. Appellate success on the latter two arguments would have resulted in a vacatur of the judgment and a retrial, after which (if convicted) Bryce would have been sentenced as he *then* stood before the court. *See Pearce,* 395 U.S. at 723 (holding that a defendant is resentenced *de novo* after retrial); *Pennsylvania v. Goldhammer,* 474 U.S. 28 (1985) (holding that there is no qualitative difference between resentencing after vacatur and resentencing following retrial); *Bryson,* 229 F.3d at 426. Bryce therefore could not have pursued the first appeal with any settled expectation that his sentence would not be increased.[2]

As it happened, Bryce challenged his conviction and sentence on appeal and did so until the date of the resentencing. Because Bryce exposed himself to the risk of

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[2] We express no view as to the soundness of the resentencing if on the original appeal Bryce had (i) not challenged the conspiracy count, or (ii) raised only challenges that would result (if successful) in reversals with prejudice. *Cf. McClain v. United States,* 676 F.2d 915, 918 (2d Cir. 1982) (holding that in a case involving non-interlocking sentences "imposition of a higher term on resentencing would pose a more difficult double-jeopardy problem than does this case").

an outcome no different than what in fact happened, he had no expectation of finality and can make no claim that he was "given a second punishment in a proceeding initiated against his will." *United States v. Coke,* 404 F.3d 836, 841 (2d Cir. 1968) (*en banc*).

b. Estoppel

We do not find defendant's estoppel argument persuasive. The defendant argues that the government was judicially estopped from seeking an increased sentence on remand. We find that the government was not estopped from seeking an increased sentence when it sought a rehearing after the initial appeal. In September 1999, the government sought reargument for this Circuit's order reversing Count 2 of defendant's conviction. The defendant claims that the government made it a condition of its request for reargument that it would have no impact on his sentence as to Count 1. Speaking to the delay of finalizing defendant's sentence if granted a reargument, the government stated:

> This delay will not prejudice the defendant in any significant way, given that the Court originally imposed concurrent sentences for each of the two counts of conviction. Because the Court of Appeals affirmed one of the two convictions, the reversal of the other one will only result in the elimination of one of the $100 special assessments; it should not result in a reduced sentence. This is particularly true given that, for the remaining count of the conviction, the defendant is subject to a ten year mandatory minimum.

Nothing contained in the statement remotely suggests a promise that the government would not seek an increased

sentence if there were intervening circumstances bearing on the defendant's criminality. In fact, as is patently clear, the statement is silent on the government's position regarding intervening circumstances bearing on the defendant's criminality. As such, defendant's reliance thereon for its estoppel argument is misplaced.

c. The Speedy Trial Act and the Sixth Amendment

We hold that the [sic] in the present case, the intervening period of twenty-three months from the time of defendant's first appeal to the final sentencing hearing did not constitute an unreasonable delay under the Speedy Trial Act. Defendant argues that the delay in imposing his final sentence violated his rights under the Speedy Trial Act and the Sixth Amendment. We find this argument to be without merit.

The Speedy Trial Act provides that a defendant shall be afforded a trial within seventy days of indictment, first appearance, or after remand from an appeal. 18 U.S.C. § 3161(c)(1) & (e). The Act makes no mention of sentencing, and creates no right to a "speedy sentencing". Courts, however, acknowledge that the Sixth Amendment guarantee to a speedy trial applies to sentencing. *See Pollard v. United States,* 352 U.S. 354, 356 (1954); *United States v. Tortorello,* 391 F.2d 587, 588 (2d Cir. 1968). The right requires a "court to determine whether [a] delay has been unreasonable in light of the peculiar circumstances of the case." *United States v. DeLuca,* 529 F.Supp. 351, 354 (S.D.N.Y. 1981).

We find that defendant's right to a speedy sentencing was not violated.[3] First, the Speedy Trial act, by its plain terms, does not apply to sentencing. Second, the delay in sentencing was not unreasonable "in light of the peculiar circumstances of [this] case." The defendant calculated the twenty-three month period from the day of this Circuit's first opinion in this case. After that date, this Circuit entertained a rehearing motion by the government, the district court conducted a new sentencing hearing, and the district court held an additional hearing on the mandate issue. All of these proceedings required further briefing by the parties. Given that this Circuit has found delays in sentencing longer than twenty-three months reasonable, we find that the delay here was also reasonable. *See Tortorello,* 391 F.2d at 589 (two and one-half year delay reasonable, despite defendant's request for immediate sentencing); *DeLuca,* 529 F.Supp. at 345-355. This is especially true considering that the record does not suggest that the government sought to intentionally create a delay.

d. Due Process

Finally, we hold that, on remand, the district court did not violate the defendant's due process rights by increasing his sentence after his successful appeal. Due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."

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[3] Also we note that prior to this appeal, the defendant never once objected to the delay in sentencing.

Pearce, 395 U.S. at 725. When a court increases a defendant's sentence after appeal without new evidence or information, a presumption of vindictiveness applies that can be overcome by objective information in the record justifying the increased sentence. *United States v. Goodwin,* 457 U.S. 368, 374 (1982). This rule "is a prophylactic one, addressed more to protect future litigants who appeal than to the injustice done in the actual case. Tolerance of a court's vindictiveness might 'chill' a defendant's right to seek an appeal of her sentence." *United States v. Campbell,* 106 F.3d 64, 67 (5th Cir. 1997). "[A] sentencing authority may justify an increased sentence by affirmatively identifying relevant *conduct or events* that occurred subsequent to the original sentencing proceeding." *Wasman v. United States,* 468 U.S. 559, 572 (1984) (emphasis added).

In the instant case, the district court's increased sentence satisfied the standards, articulated in *Pearce* and refined by *Waserman* [sic], that protect against vindictive sentencing. It is clear that, on remand, the district court predicated its increased sentence on events which occurred subsequent to the original sentencing proceeding. Here, as a result of a new witness coming forward after the original sentencing proceeding, the government was able to elicit information implicating the defendant in Fitzpatrick's murder. The district court found, by a preponderance of the evidence, that the defendant murdered Fitzpatrick before the first sentencing hearing. *Waserman* [sic] clearly establishes that the "subsequent actions or events" required by *Pearce* to overcome a presumption of vindictiveness need not be actions undertaken by the defendant. In *Waserman* [sic], the Supreme Court upheld a sentence after appeal that accounted for a felony conviction entered

between the two sentencing hearings. The Supreme Court did so despite the defendant's argument that the events of the intervening felony occurred before the first sentencing hearing. *Waserman* [sic], 468 U.S. at 562.

In addition, the district court's increased sentence did not violate the supervisory rules we set forth in *Coke*. In *Coke,* we held that because "the prospect of an increased sentence on retrial is sufficiently threatening to the assertion of defendants' rights," increased sentences should be strictly limited "to cases truly calling for it". *Coke,* 404 F.2d at 845. Such limited circumstances include when the defendant engages in anti-social conduct following the initial sentence or when the defendant's criminal activities are shown to be more offensive at the second trial than was thought at the time of the first sentencing. *Id.* at 842-43. The facts of this case fall within the second exception to *Coke's* general disfavor of increased sentences upon resentencing. Here, the district court's finding, by a preponderance of the evidence, that the defendant committed murder sufficiently demonstrated to the district court that defendant's criminal activities were more offensive than previously thought and thus supported the district court's imposition of an increased sentence.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the new sentence imposed by the district court.

UNITED STATES

v.

Ewan BRYCE.

No. 3:97CR249(RNC).

United States District Court,

D. Connecticut.

April 6, 2001.

David A. Ring, U.S. Attorney's Office, Hartford, CT, John H. Durham, Peter D. Markle, U.S. Attorney's Office, New Haven, CT, for U.S.

Salvatore J. Petrella, Cromwell, CT, for defendant.

MEMORANDUM OPINION

CHATIGNY, District Judge.

At a resentencing on February 23, 2001, the defendant's sentence for conspiracy to distribute cocaine was increased to the statutory maximum of twenty years based on a finding that in an attempt to avoid being convicted of that offense he murdered a government witness.[1] Before the resentencing, a jury had acquitted the defendant of the murder. However, because the evidence that he killed the victim amply satisfies the preponderance standard applicable to findings by a sentencing judge, imposing the

[1] *See* U.S.S.G. § 1B1.3(a)(1) (guideline offense level shall be determined based on all acts committed by defendant during commission of offense or in course of attempt to avoid responsibility for offense).

statutory maximum was required by the guidelines unless the mandate or other controlling authority precluded an increase in the sentence. Finding no such bar in the mandate or relevant case law, I concluded that whatever expectation the defendant might have had in not being subjected to increased punishment did not overcome the societal interest in imposing a sentence "that appears just in light of the latest and best information." *United States v. Coke,* 404 F.2d 836, 843 (2d Cir.1968) (en banc).

In accordance with 18 U.S.C. § 3553(c), the reasons for the increased sentence were stated in the presence of the defendant at the hearing. Usually such an oral statement is sufficient for all purposes. However, in the special circumstances of this case, it is necessary to demonstrate that the increase is based on new information that was not available at the time of the first sentencing, and the evidence justifying the increase must be made part of the record to ensure that the basis for the sentence may be fully reviewed on appeal. *See North Carolina v. Pearce,* 395 U.S. 711, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). This memorandum serves those purposes. In addition, I take this opportunity to explain why the increase does not run afoul of the mandate or relevant precedent.[2]

Facts

In December 1997, a grand jury returned an indictment charging the defendant with conspiracy to possess with intent to distribute, and to distribute cocaine, 21

[2] The defendant has filed a notice of appeal. The filing of the notice prevents me from altering the judgment but does not prevent me from filing this memorandum.

U.S.C. § 846 (count one), and possession with intent to distribute, and distribution of, cocaine, 21 U.S.C. § 841(a)(1) (count two). The defendant was released on bond and trial was scheduled to start in mid-April. On March 15, 1998, a confidential informant named Jermaine Fitzpatrick who had assisted in the investigation of the case was murdered. The defendant's trial went forward on schedule and resulted in his conviction on both counts. In August 1998, he was sentenced on each count to imprisonment for 123 months and supervised release for five years, the sentences to run concurrently. He was also ordered to pay a special assessment of $100 on each count for a total of $200.

The defendant appealed attacking both counts of conviction. In an opinion issued in August 1999, the court of appeals affirmed the judgment on count one, reversed the judgment on count two for insufficiency of the evidence, and remanded for resentencing. *See United States v. Bryce,* 208 F.3d 346 (2d Cir.1999). The government filed a petition for rehearing but the defendant did not. In due course, the court of appeals issued an amended opinion adhering to its original decision and remanding the case with the following instructions: "Accordingly, we reverse Bryce's conviction for possession with intent to distribute and distribution (Count Two), affirm the district court's judgment as to Bryce's conspiracy conviction (Count One), and remand for resentencing." *See United States v. Bryce,* 208 F.3d 346, 356 (2d Cir.1999). Later, a mandate issued containing the following language: "it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in part, reversed in part, and the case is remanded to the

district court for further proceedings in accordance with the opinion of this court."

While the appeal was pending the defendant was indicted for murdering Fitzpatrick with intent to prevent him from testifying at the drug trial, 18 U.S.C. § 1512(a)(1)(A), and with intent to retaliate against him for providing information to law enforcement, 18 U.S.C. § 1513(a)(1)(A). *See* Indictment, *United States v. Ewan Bryce,* No. 3:99-CR-238 (RNC).[3] The murder case was transferred to me with the defendant's consent because it related to the underlying drug case then on appeal. In the course of the murder trial, the defendant took the stand. He admitted his involvement in cocaine trafficking (which he had previously denied), but denied killing Fitzpatrick. The jury returned a verdict finding that the defendant's guilt had not been proven beyond a reasonable doubt. The defendant then appeared for resentencing in this case.[4]

Before the resentencing, both sides submitted papers seeking a new sentence on the surviving count of conviction

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[3] In compliance with the *Pearce* requirement that the factual data underlying the increased sentence be made a part of the record for appellate review, *see* 395 U.S. at 726, 89 S.Ct. 2072, I am directing that the record in this case be enlarged to include materials from the record in the murder case, specifically, the indictment and transcripts of the testimony of the following witnesses: Ewan Bryce, Sean Crowe, Kawayne Gore, Larry Huff, Darren Johnson and Travell Leonard. Additional materials can be made part of the record on request.

[4] At the resentencing, it was suggested that the government had manipulated the scheduling of the resentencing to ensure that it did not occur until after the murder trial. However, the court's decision to defer the resentencing until after the trial was the product of a joint proposal of the parties, which appeared to suit the defendant's interests at the time.

(i.e., the conspiracy count). The government asked for a substantial increase for relevant conduct on the ground that the defendant killed Fitzpatrick to prevent him from testifying in this case. The defendant sought a sentence reduction on the grounds that his testimony in the murder case entitled him to credit for acceptance of responsibility under the guidelines, and he had suffered extraordinary emotional distress as a result of being charged with a capital offense he did not commit.[5]

Neither side's papers specifically addressed the question whether the sentence on the conspiracy count could be altered if the sentences previously imposed on the two counts were not interrelated. That question needed to be addressed in light of *United States v. Pisani*, 787 F.2d 71, 75-76 (2d Cir.1986), which declined to remand a case for resentencing on one count after unrelated counts had been dismissed. Accordingly, the hearing was adjourned pending further briefing. The government subsequently submitted a supplemental brief in support of its view that the sentencing had to be de novo. The defendant responded that the terms of the mandate made the sentence on the conspiracy count untouchable.

At the sentencing hearing, the parties were asked to present argument on two basic issues: whether the sentence previously imposed on the conspiracy count could be increased; and, if so, whether the defendant should be sentenced based on the guideline for first degree murder,

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[5] The defendant also argued that his sentence should be reduced in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

U.S.S.G § 2A1.1. After further consideration of the parties' positions, as fleshed out during oral argument, the defendant was sentenced de novo based on that guideline, which increased the offense level to 43. At that level, the guideline sentence is life imprisonment. However, the sentence could not exceed the statutorily authorized maximum of twenty years. *See* U.S.S.G. § 5G1.1(a). Considering the seriousness of the defendant's conduct, and the strength of the government's showing, I saw no reason to depart downward and therefore imposed the statutory maximum.

Discussion

The Supreme Court has emphasized that to ensure an absence of vindictiveness, a judge must demonstrate that an increased sentence following an appeal is warranted by new facts concerning the defendant. *See Pearce,* 395 U.S. at 725-26, 89 S.Ct. 2072. Here, the new facts concern the defendant's murder of Fitzpatrick to prevent him from testifying. At the time of the initial sentencing, nobody suggested that the defendant had killed a government informant in an attempt to prevent him from testifying, and the government did not have the means of proving that the defendant had killed Fitzpatrick for that purpose.[6] The evidence now before the court readily establishes by at least a preponderance that the defendant did kill Fitzpatrick in an attempt to avoid being convicted in this case.

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[6] The government's key witness, Larry Huff, did not cooperate until after the first sentencing.

The following facts concerning the murder are essentially undisputed. Fitzpatrick was killed at about 1:47 a.m. in the parking lot of the Ranch House restaurant in Hartford. He was shot eleven times in the face and chest area at very close range with a .40 caliber pistol made by either Taurus or Ruger.

Fitzpatrick spent the last few hours of his life in the company of Larry Huff, who was a close friend of his, and the defendant, with whom he was not known to socialize. The defendant had arranged for the three men to go out that night so he could speak with Fitzpatrick about the drug case, which was scheduled to go to trial within a matter of weeks.

Shortly before the shooting, the three arrived at the parking lot in Huff's car in order to drop off the defendant, who had left his car at the lot earlier in the evening. The defendant, who was sitting in the front seat, announced that he was going home and got out. Fitzpatrick, who was sitting in the back seat, followed the defendant out of the car in order to move to the front. Within seconds of Fitzpatrick's exit, the shooting began. The force of the gunfire propelled Fitzpatrick's body back through the open door of Huff's car and he wound up lying on the front seat with his legs sticking out the open door.

In the context of these undisputed facts, the parties dispute whether Fitzpatrick was killed by the defendant or some unknown assailant. The government contends that the defendant shot Fitzpatrick while wearing gloves, drove from the scene to dispose of the murder weapon and gloves, then returned immediately, pretending that he had never left. I am persuaded that the government is correct.

The witness on whom the government primarily relies is Larry Huff, Fitzpatrick's friend. *See* Transcript of Testimony of Larry Huff, Sept. 20-21, 2000, at 10. Huff has testified that when he and Fitzpatrick met the defendant at the Ranch House, the defendant said to Fitzpatrick, "the word is out that you snitched, that you're telling on people, [and] that you're working with the Government." *Id.* at 30-31. Fitzpatrick denied the accusations and the defendant said he wanted Fitzpatrick to meet with his criminal lawyer to discuss the matter. *Id.* This "same conversation" continued for fifteen to twenty minutes until the three arrived at their destination, the parking lot of a nightclub, where it continued for another ten minutes. *Id.* at 32-33. After attending a party at the club, the three got back together in Huff's car to return to the Ranch House to drop off the defendant. On arriving at the Ranch House, Huff pulled in next to the defendant's car. *Id.* at 39. For the next half hour, the defendant continued to have the "same conversation" with Fitzpatrick concerning the drug case. *See id.* at 39-40.

Huff testified that after the defendant and Fitzpatrick got out of the car at the Ranch House, he heard Fitzpatrick say, "What the F." *Id.* at 43-44. Huff turned and saw Fitzpatrick's arm go up "like he was trying to block something." *Id.* at 44. Huff then saw sparks and heard gunfire and realized that the defendant was shooting Fitzpatrick at point blank range. *See id.* Huff could not see the defendant's face because of the roof of the car, but the defendant's clothing was visible to him. *Id.* at 44-45. Huff fled into the woods to avoid being shot himself. *Id.* at 45. After the shooting stopped, he heard the sound of "some tires screeching, like somebody pulling off." *Id.* at 47. Huff returned to the parking lot in shock. On encountering the

defendant, he looked at him and said, "What the F?" *Id.* at 50. The defendant responded by looking Huff in the eyes and saying repeatedly, "What you mean what the F?" *Id.* at 51.

I credit Huff's testimony. His account is consistent with videotapes taken from security cameras at a gas station across the street from the crime scene. The videotapes show witnesses responding to the sound of gunfire by looking in the direction of the place where Huff's car was parked. The witnesses then turn their heads to follow the path of a car leaving the scene. The videotapes do not show the getaway car but witnesses have described it as a small black car, a description that matches the car the defendant was driving.

In the wake of the shooting, the defendant and Huff gave statements to investigators denying that they saw what happened. The defendant subsequently engaged in a course of conduct reflecting a concern on his part that Huff stick by that story. Among other things, he bought Huff a car to replace the one that had been seized as evidence, *see id.* at 57-60, and brought him job applications, including one from the place where the defendant was working. The defendant told Huff he "should stop hustling [i.e. selling drugs] because the Government [would] try to bust [him] and have [him] tell them what happened at the murder." *Id.* at 61. Later, after the defendant began to serve his sentence in this case, he asked his close friend Travell Leonard to contact Huff and tell him to "be careful." *See* Transcript of Testimony of Travell Leonard, Sept. 20, 2000, at 15. Leonard delivered the message, telling Huff that the defendant wanted to know whether he was "talking to anybody." *See* Huff Tr. At 63.

The defendant had an obvious motive for preventing Fitzpatrick from testifying. Darren Johnson has testified that Fitzpatrick helped arrange the cocaine transaction between Johnson and the defendant that was captured on the wiretap in this case. *See Transcript of Testimony of Darren Johnson,* Sept. 25, 2000, at 6-8. Before Johnson and the defendant were indicted, the defendant visited Johnson in jail. *See id.* at 8. During the visit, Johnson told the defendant that they were going to be indicted, that Fitzpatrick was the one who had set them up, and that the defendant should leave town. *Id.* at 10-11. After the indictment was issued, the defendant visited Johnson again. *Id.* at 12. The defendant said "he'd do anything to beat his case," *id.* at 13, which exposed him to a mandatory minimum sentence of ten years, and asked if Johnson knew where Fitzpatrick "hung out." *Id.* Before leaving he told Johnson, "[O]nce I find Jermaine, [you] know what time it [is]." *Id.* at 13.

Johnson's testimony is consistent with the testimony of Kawayne Gore, a lifelong friend of the defendant. *See* Transcript of Trial Testimony of Kawayne Gore, Sept. 25, 2000, at 4-5. At the murder trial, Gore testified that he accompanied the defendant on one of the defendant's trips to see Johnson in jail. *Id.* at 13. After speaking with Johnson, the defendant reported to Gore that Johnson had informed him that Fitzpatrick might be "snitching." *Id.* at 14. The defendant appeared to be "shocked," *id.* at 15, and asked Gore whether he should kill Fitzpatrick. *Id.* at 15-16.

Gore also testified that in 1997, the year before Fitzpatrick was killed, he saw the defendant with a pistol that the defendant described as a "Taurus forty." *Id.* at 22.

As mentioned earlier, the weapon used to kill Fitzpatrick was a .40 caliber pistol made by either Taurus or Ruger.

The defendant has testified that he did not kill Fitzpatrick and did not see who did. *See* Transcript of Testimony of Ewan Bryce, Sept. 26, 2000, at 23. According to his account, he got out of Huff's car, got into his own (which was parked next to Huff's), and was starting to back up when he heard a "pop." *Id.* at 19. He ducked, spun his car around, drove to the other side of the lot, parked, jumped out, saw a crowd looking at Huff's car, and started to go back there to "figure out what the crowd, what everybody was looking at." *Id.* at 19. He saw Huff coming from the side of the building, followed him into the Ranch House and asked him, "Yo, what happened?" *Id.* at 19-20. He then called 911. This line of testimony, which strained credulity, was effectively impeached on cross-examination.

At the murder trial, the defendant told the jury that he had no motive to kill Fitzpatrick. He testified that although he sold crack cocaine to Fitzpatrick, and heard people saying Fitzpatrick was a snitch, he "really didn't have any concern with him," *id.* at 12, and actually wanted to use him as a character witness. See *id.* at 73. The defendant's implausible testimony on this key point is contradicted by the credible testimony of Johnson, Gore and others, and must be rejected as untrue.

My assessment of the credibility of the defendant's account is influenced by his conduct in connection with the initial sentencing in this case. After he was convicted, the defendant sent me a letter blaming a biased jury for presuming him to be guilty when in fact he was innocent. *See* Presentence Report, Letter from Ewan Bryce of 5/19/98 ("With all due respect, I don't think I stood a

chance from day one with the jury. I also believe that they, the jury, presumed me guilty from the simple fact of the Government having me in court, period. To inform you, I turned myself into the authorities after learning about my indictment, and after finding out the charges I knew that I was innocent."). Several months later, when he appeared in court for the sentencing hearing, he made a tearful statement asserting once again that the case against him was based on lies and that the jury had wrongly assumed he was guilty. *See* Transcript of Sentencing, No. 3:97-CR-249(RNC), at 69-73. The defendant's admissions during his trial testimony in the murder case concerning his cocaine trafficking activities in 1997 establish that his previous statements were false.[7]

Because the record establishes by at least a preponderance that the defendant killed Fitzpatrick to prevent him from testifying in this case, relevant conduct that clearly calls for a substantially higher sentence than the one he received in the first instance, the question remains whether he could be given an increased sentence on the conspiracy count following his partially successful appeal. As discussed at the sentencing hearing, I believe that in the circumstances presented here the sentence could be increased in accordance with the guidelines.

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[7] At the murder trial, the defendant called a surprise witness who purported to be an eyewitness to the murder. She claimed that she saw an unidentified person pull up in a car on the street in front of the Ranch Rouse [sic], run to Huff's car, fire the shots, then flee. Based on her demeanor while testifying, and the content of her testimony, I reject her testimony as unreliable and inaccurate.

As noted earlier, the defendant opposed an increase in the sentence on the ground that it was precluded by the mandate. Though that interpretation of the mandate is plausible, it makes more sense to construe the mandate as vacating the original sentence and remanding for de novo sentencing. As the government emphasizes, the Second Circuit has adopted a mandate rule that permits, if it does not require, de novo sentencing unless the mandate specifically limits the scope of resentencing. *See United States v. Atehortva,* 69 F.3d 679, 685 (2d Cir.1995) ("[T]he resentencing was appropriately treated as a de novo sentencing, for the remand did not specifically limit the scope of the sentencing."). The mandate in this case contains no such limiting instructions. If the court of appeals intended that nothing be done except vacating the sentence on count two, it could have exercised its authority to vacate that part of the sentence without a remand, *see* 28 U.S.C. § 2106, or remanded with a limiting instruction. Because it did neither of those things but instead remanded for resentencing with no limiting instructions, the mandate did not preclude an increase in the sentence warranted by new information about relevant conduct. *See United States v. Bryson,* 229 F.3d 425, 426 (2d Cir.2000) ("The Second Circuit has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing.").

At the resentencing, the defendant argued that he acquired a legitimate expectation of finality in his original sentence as of the date the government filed its petition for rehearing in the court of appeals and that imposition of a higher sentence would therefore violate the Double Jeopardy Clause. The defendant's argument is somewhat inconsistent with his submission seeking a reduced sentence.

However, assuming the defendant had a subjective expectation of finality once the government requested rehearing, his interest is not controlling. In *Atehortva,* the Second Circuit wrote, "[t]he Supreme Court and this court have clearly held that the double jeopardy provision has no application in this context. *See Pearce,* 395 U.S. at 719-21, 89 S.Ct. 2072; *Coke,* 404 F.2d at 839-41." 69 F.3d at 687. *Atehortva* is distinguishable because the three counts of conviction in that case were "inextricably tied" to each other for purposes of determining the sentencing range under the guidelines. *See id.* at 685. However, that distinction does not justify applying the Double Jeopardy Clause here. As in *Atehortva,* the double jeopardy provision does not apply because the defendant is not "being given a second punishment in a proceeding initiated against his will." *Coke,* 404 F.2d at 841.[8]

The Supreme Court has made it clear that due process limitations on imposition of increased punishment after a successful appeal are based on the need to avoid an

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[8] In *Coke,* the Second Circuit found it unnecessary to say whether the rule permitting a defendant to be retried following the setting aside of a conviction is based on "the fiction of a 'waiver' or on the more nearly satisfactory basis of 'continuing jeopardy,' *see* Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions,* 74 Harv.L.Rev. 1, 5-8 (1960)[,]" because "it suffices that freedom would be a disproportionate reward for a trial error." 404 F.2d at 839. In cases involving resentencing after a defendant's partially successful appeal, like this case and *Atehortva,* the best explanation for why the double jeopardy provision does not apply appears to be the concept of continuing jeopardy. *See* Mayers and Yarbrough, 74 Harv.L.Rev. at 7 ("If the evil about which the framers were concerned was harassment of a defendant by successive prosecutions for the same activity, jeopardy properly may be thought of as continuing until the final settlement of any one prosecution.").

appearance of judicial vindictiveness. *See Texas v. McCullough,* 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986) (presumption of vindictiveness does not apply if different judge imposes higher sentence); *Wasman v. United States,* 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) (presumption adequately rebutted by consideration of intervening conviction); *Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (presumption inapplicable to resentencing by jury). When the record on resentencing contains new information about relevant conduct requiring a higher sentence under the guidelines, an increase in the sentence may be readily justified as the product of applicable law and the exercise of objectively reasonable sentencing discretion. That is the case here.

In *Coke,* the Second Circuit held that a higher sentence may lawfully be imposed after a retrial based on conduct of the defendant occurring after the first sentencing or facts that were previously unknown because of some action on the part of the defendant. 404 F.2d at 846. The court could "perceive no reason why 'there must be repose * * * as to the severity of the crime,' when it is the defendant who has shattered the repose." *Id.* at 846 quoting *Marano v. United States,* 374 F.2d 583, 585 (1st Cir.1967) (internal citation omitted). And the court thought it entirely proper that a defendant should have to take the risk of a higher sentence into account in deciding whether to appeal. *Id.* Exercising its supervisory power to protect the interest that appeals not be deterred, the court restricted the practice of imposing increased sentences to "cases truly calling for it." *Id.* at 845. More recently, the court has stated:

> Though the prospect of increasing one component of the sentence creates an arguable deterrent to a

> challenge to another component that might be unlawful, we think the legitimate purposes of sentencing counsel against an absolute rule barring all increases of any component after another component has been successfully challenged.

United States v. Bohn, 959 F.2d 389, 394-95 (2d Cir.1992). Here, the increase is truly called for and although it is severe the resulting sentence is not.

What remains for consideration is the decision in *Pisani.* In that case, the court of appeals rejected the government's attempt, in the absence of a cross-appeal, to obtain an increased sentence on one count after the defendant successfully appealed his conviction on numerous other counts, which had been joined as a matter of trial convenience. *See* 787 F.2d at 75-76. The court decided that just because the sentences on the invalidated counts were higher than the sentence on the surviving count did not mean that consideration of an increased sentence on the surviving count was warranted. *See id.* at 76 and n. 5. *See also Bohn,* 959 F.2d at 394 ("As we ruled in *Pisani,* . . . , the Government cannot obtain an increase in a sentence on one count in response to a reduction in a sentence on an unrelated count."). In this case, the defendant's sentence on count one has been increased, not because the concurrent sentence on count two has been vacated, but because of new information concerning relevant conduct on the part of the defendant that mandates an increase under the guidelines. *Pisani* does not immunize a defendant against such an increase.

Conclusion

For the foregoing reasons, the increased sentence imposed on the defendant is proper.